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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1513

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD S. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–41a) is reported at 490 F. 2d 868. The opinion of the district court, in the form of "Findings of Fact and Conclusions of Law" (Pet. App. B, pp. 42a–52a), is reported at 349 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1973 (Pet. App. C, pp. 53a–54a). A timely petition for rehearing was denied on February 6, 1974 (Pet. App. D, pp. 55a–56a). By order of February 28, 1974, Mr. Justice Marshall ex-

tended the time for filing a petition for a writ of certiorari to and including April 7, 1974 (a Sunday). The petition was filed on April 8, 1974, and was granted on May 28, 1974, along with the petition *United States* v. *Wilson*, No. 73–1395, and the cases were set down for argument in tandem. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from appealing an order of the district court dismissing an indictment, after a trial without a jury, where the district court found that the defendant committed the acts charged in the indictment but concluded as a matter of law that the defendant had established an affirmative defense, and where the error of the district court can be corrected without a retrial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890, provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal

shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * * * *

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned in the United States District Court for the Eastern District of New York, respondent, a registrant under the Universal Military Training and Service Act, was charged with having "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induction into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. 462(a) (App. 3).

Although the essential facts of the case were undisputed, respondent made no motion to dismiss the indictment prior to trial. Instead, on July 8, 1972, indicating his intention to proceed to trial, respondent filed a number of papers including a motion concerning the *voir dire* of prospective jurors, requests to charge the jury, a trial memorandum of law, and a motion for a judgment of acquittal (App. 1, 4). Subsequently, on October 3, respondent waived a jury trial, and the case was tried and concluded before the district court on that day. Three weeks later, on Octo-

ber 24, the district court filed a document entitled "Findings of Fact and Conclusions of Law" (Pet. App. B, pp. 42a–52a). The court found that, as charged in the indictment, "the Local Board mailed to defendant * * * an Order to Report for Induction on February 24, 1971," which was received by him, that only thereafter did the defendant make a conscientious objector claim, and that "[t]he defendant did not report for induction on February 24, 1971" (*id.* at 43a–44a).[1] The district court then proceeded to discuss respondent's defense to the indictment, "that at the time of his alleged commission of the crime,

[1] The "Findings of Fact" were as follows:

"1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

"2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

"3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

"4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

"5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

"6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

"7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his

viz., his refusal to submit to induction, the law of the Second Circuit [since overruled by *Ehlert* v. *United States*, 402 U.S. 99] was such that he was entitled to a postponement of his induction to enable the Board to pass on his claim for C.O. status" (Pet. App. B, p. 44a), a claim which he had concededly asserted for the first time after receiving his notice to report for induction (*id.* at 43a). Finding the law of the Circuit at the time to be as stated, the court concluded that "the defendant JENKINS would be [prejudiced] by a retroactive application of Ehlert" (*id.* at 50a).[2] Accordingly, the district court concluded that it "cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law" (*id.* at 52a). Under the heading "Conclusions of Law," the district court stated that "[t]he indictment in this case is dismissed and the defendant is discharged" (*ibid.*).

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request for a postponement of his induction had been denied.

"8. The defendant did not report for induction on February 24, 1971.

"9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971."

[2] The district court made no express finding that Jenkins had in fact relied on "the applicable law of the Second Circuit." The reason for the absence of such finding is that neither the respondent nor the draft counselor with whom he consulted, and who was called to testify as to respondent's sincerity (App. 70), testified that they had relied on "the applicable law of the Second Circuit." Respondent's claim boiled down to the argument that the local board was bound to follow "the applicable law of the Second Circuit" (even though that "law" was subsequently held to be erroneous) and that the lawfulness of the local board's action must be viewed in light of the Second Circuit's understanding of the law at the time.

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2. Since the order of the district court here conflicted with the holding of the district court in *United States* v. *Mercado*, 359 F. Supp. 604 (S.D.N.Y.), which was then pending on appeal from a judgment of conviction, the Solicitor General authorized an appeal to the court of appeals pursuant to the Criminal Appeals Act, 18 U.S.C. 3731.[5] The court of appeals stated that Congress intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause (Pet. App. A, p. 5a):

> Appellant asserts, and appellee does not dispute, that Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91–1296, at 4–13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal.

But the majority (over the dissent of Judge Lumbard) held that an appeal was barred in this case by the Double Jeopardy Clause. The court reasoned that, "for double jeopardy purposes," the district court judge had acquitted the respondent (*id.* at 25a–26a):

> His ruling was based on facts developed at trial, which were not apparent on the face of

[5] Indeed, in *Mercado*, 478 F. 2d 1108, the Second Circuit seemingly vindicated our position on the merits in the present case (see *infra*, pp. 14–15).

> the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert,* and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Although a reversal of the order of the district court would not have necessitated a retrial, but only a direction to the district court to enter a judgment in accordance with its findings, the court in effect held that the appeal itself placed respondent in jeopardy a second time. In reaching this conclusion, the majority relied principally on what it characterized (Pet. App. A, p. 16a) as the "dictum" in *United States* v. *Bell,* 163 U.S. 662, 671, that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." While the court of appeals found that this dictum had been followed in subsequent cases (*Kepner* v. *United States,* 195 U.S. 100; *Fong Foo* v. *United States,* 369 U.S. 141; and *United States* v. *Sisson,* 399 U.S. 267), it suggested that a "[r]e-examination of the dictum in Ball * * * may well be

desirable, particularly now that the Double Jeopardy clause has been extended to the states." It concluded, however, that "this is far beyond our power as an inferior court" (Pet. App. A, pp. 29a–30a, n. 20).

Judge Lumbard, who dissented from the holding of the majority, concluded that "the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case" (Pet. App. A, pp. 40a–41a):

> An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice. Only last term, the Supreme Court in *Illinois* v. *Somerville,* 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again". 410 U.S. at 470.
>
> I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado,* 478 F. 2d

1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert,* the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.

Accordingly, I would vacate the order of the court below and remand for a proper application of the law. [Footnote omitted.]

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case presents a narrow but important issue with respect to the government's right of appeal in criminal cases. Because of the recent amendment to the Criminal Appeals Act (18 U.S.C. 3731, as amended by 84 Stat. 1890), the answer is controlled directly by the Double Jeopardy Clause of the Fifth Amendment[4] and involves none of the familiar debates about the correct definition of a motion in arrest of judgment or a motion in bar. See, *e.g., United States* v. *Sisson,* 399 U.S. 267. Partly because of the prior statutory history, the constitutional question tendered here has never been directly resolved by this Court. Certainly, it is not foreclosed by *Sisson,* a

[4] So much is common ground. Nor is a contrary position tenable: the Criminal Appeals Act, 18 U.S.C. 3731, now allows the government to appeal from any "decision, judgment, or order of a district court dismissing an indictment or information," whatever the ground, except only "where the double jeopardy clause of the United States Constitution prohibits further prosecution." Whatever its correct characterization, the district court's action in this case, which dismissed the indictment, is within the Statute. See our brief in *Serfass* v. *United States,* No. 73-1424, at pp. 12-19.

decision controlled by statutory restrictions, now removed, and otherwise distinguishable.

On the other hand, the case invokes no novel doctrine. We eschew the temptation of a full reexamination of the double jeopardy principle, because the limited compass of the issue presented does not require it. In the present setting, there is no occasion to define the boundaries of the principle that a factual determination on the merits which acquits the defendant—whether made by a jury or a judge—insulates him from further proceedings. The only submission we make here is that a purely legal error that can be isolated from any fact finding is correctable by appeal without implicating the Double Jeopardy Clause—at least if correction does not require retrial of any fact already found.[5]

The question does not, of course, arise in the usual case that reaches a conclusion. In a trial to a jury, after the return of a general verdict, the problem presented here occurs only if the jury convicts and the judge thereafter enters a contrary judgment. So, also, in a case tried to the court alone, an unexplicated acquittal does not raise the issue that concerns us here. The rule we postulate reaches only those situations in which the factual determination and the legal conclusion are clearly separated, and correction of the error of law leaves the findings of fact undisturbed.

[5] In stating the question so narrowly, we should not be understood to foreclose a broader argument. Specifically, we do *not* concede that the Double Jeopardy Clause bars every government appeal which, if successful, would require a retrial. See footnote 16, *infra*. But, because whether a new trial must follow an appeal is always a relevant consideration, we focus on that circumstance in this case.

But, when those conditions are met, we submit the Double Jeopardy Clause does not bar the government's appeal, regardless of *when* the error of law occurred (whether before, during or after trial), and—regardless of the *label* attached (a dismissal of the indictment, a directed verdict, a judgment of acquittal, or the sustaining of a motion in arrest). If we are right, it follows that the district court ruling here is appealable, notwithstanding that it was based on facts "developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case" (see Pet. App. A, p. 26a)—provided only that the appeal does not disturb any of the underlying facts found.

Accordingly, before defending our thesis, it is essential to establish that the district court's action sought to be appealed was, indeed, a pure decision of law, and was one that can be corrected without retrial. If we seem to belabor the point, it is only because the majority opinion below appears to cast doubt on both those premises by characterizing the dismissal as a "holding that the [Selective Service] statute should not be applied to [the defendant] *as a matter of fact*" (Pet. App. A, p. 26a, emphasis added),[6] and by suggesting that a new trial might be necessary if the government's appeal succeeded (Pet. App. A, p. 28a).

1. Admittedly, the district judge made a factual determination. As it happens, the only facts that mat-

[6] Elsewhere in its opinion, the court of appeals apparently acknowledges that we challenged only a ruling of law. See Pet. App. A, pp. 28a–29a, 31a.

ter were undisputed and might have been stipulated before trial or recited in the indictment. In the event, they were disclosed in the trial. What controls, however, is that these critical facts were expressly articulated in findings entered by the district court—quite distinct from the ruling of law—and were not sought to be challenged on appeal. Of course, these facts were the predicate for the court's order. But they remain wholly separate and can be left undisturbed while the legal issue is tested. The case is precisely the same as if the findings of fact had been entered by a special jury verdict—or by the judge at an earlier date—and the court subsequently ruled, as a matter of law, that they foreclosed conviction.

The separateness of the factual findings is entirely clear in this case. This is not one of those situations in which the result turned on credibility or demeanor or assessing a mental attitude (*e.g.*, "willfullness" or "sincerity"). Compare *United States* v. *Sisson*, *supra*, 399 U.S. at 277–278, 286–287, 288, 289. Here, the facts relevant to the legal ruling were wholly objective and impersonal. The character and beliefs of the defendant were irrelevant. Indeed, the result is governed solely by the timing of undisputed events.

Shortly stated, the facts were these: respondent was found to have failed to report for induction after having been classified I–A, after having received his notice to report, and after having been told that his induction would not be postponed on account of a belated conscientious objector claim made for the first time subsequent to receipt of the induction notice

(Pet. App. B, pp. 43a–44a). The only legal question posed and resolved by the district judge (erroneously, we say) was whether, given the sequence of these actions, respondent violated 50 U.S.C. App. 462(a). The district court ruled in the negative. That ruling, we submit, was plainly one of law, no less than this Court's contrary holdings in *Ehlert, supra,* and *Musser* v. *United States,* 414 U.S. 31.

2. Because the decision from which the appeal was taken is a pure legal ruling, we could perhaps argue, as Judge Lumbard concluded below (Pet. App. A, pp. 32a–39a), that it is more properly described as a "dismissal." effectively arresting judgment, than an "acquittal." We acquiesce in the characterization given by the majority below only because *Sisson* teaches us that a final disposition on the merits that looks beyond the face of the record and is bottomed on facts adduced at trial, is an "acquittal." But, of course, so categorizing the decision does not end the inquiry, any more than does the trial judge's choice of rubric. See *United States* v. *Jorn,* 400 U.S. 470, 478, n. 7; *United States* v. *Sisson, supra,* 399 U.S. at 279, n. 7.

At all events, we must not be misunderstood to accept that this "acquittal" is of a kind with a general jury verdict of "not guilty" or the equivalent of an unexplicated conclusion of a judge sitting alone as trier of fact.[7] On the contrary, the ruling appealed here is of the same character as an order arresting

[7] This will not ordinarily occur in a non-jury trial, since Rule 23(c) of the Federal Rules of Criminal Procedure requires the judge "on request [to] find the facts specially."

judgment for failure of the indictment to state an offense, or a judgment ordered on special jury findings, or, indeed, the decision of an appellate court. That here the judge both found the facts and drew the legal conclusion, and incorporated both in the same document, is irrelevant—so long as we can clearly distinguish the exercise of each function, leaving the first untouched and challenging the other. As we have shown, there is in this case no arguable difficulty in severing the legal error.

3. We turn now to the question whether a successful appeal by the government would require a retrial. We think not. Indeed, it seems to us plain that the findings of fact already entered by the district court will compel the entry of a judgment of conviction, without any further proceedings, if the legal ruling is reversed on appeal (as we say it must be under *Ehlert* and *Musser*). In our view, the findings already made—resolving every possible issue on the merits—leave no room for any other course.

To be sure, the court of appeals, adverting to its earlier opinion in *United States* v. *Mercado*, 478 F. 2d 1108, 1111 (C.A. 2), suggests that respondent might still have available to him the defense that, in failing to report for induction, he "in fact reasonably relied in good faith on the [pre-*Ehlert*] case law or upon the knowledge that local boards in [the Second Circuit] * * * would consider a belated conscientious objection claim" (*ibid.*). But, even accepting the validity of

such a defense in a proper case,[8] it is foreclosed to respondent. First, just as in *Mercado* itself (where the conviction was affirmed), "[t]here has been no showing that he in fact was aware of or relied upon the case law * * *" (*ibid.*). Respondent never suggested such an excuse, although both he and his "counselor" testified at the trial (see n. 2, *supra*, p. 5). Moreover, whatever respondent knew of Second Circuit law when he belatedly advanced his conscientious objector claim, he well knew, before he committed the offense of failing to report for induction, that the board had refused to delay or excuse his reporting as scheduled. As the district court expressly found, "he was told to report for induction on the next day because his request for a postponement of his induction had been denied" (Pet. App. B, p. 44a). Nor has respondent ever disputed this fact. Thus, at the relevant time, he cannot have been under any misapprehension.

At all events, however, respondent has estopped himself by advancing no such claim at trial. This was not a case prematurely ended before the defendant had opportunity to make his full defense. He put in all the

[8] Both in this case and in *Mercado*, the court of appeals merely suggests, very tentatively, the possibility of such a defense. Indeed, in *Mercado*, the court first rejected the suggestion for that case and cited other decisions to the effect that the "erroneous belief that an induction order is invalid" normally constitutes no defense, and only then commented that "perhaps there is room for flexibility in enforcement of this rule to avoid injustice in a particular case" (478 F. 2d at 1111).

evidence and made all the arguments he deemed appropriate, and, on that basis, the trier of fact—here the judge—reached factual conclusions. Normally—absent newly discovered evidence—that would be the end of the matter. Overlooking an arguable defense based on facts always available is no ground for a new trial. It would not be where a decision arresting judgment is overturned on appeal. No more is it here. But even if respondent were ultimately to obtain a new trial, that would be at his own instance, on grounds which he might equally have advanced if convicted—not a consequence of any ruling in the present appeal. Thus, under settled principles, the possibility that respondent could obtain a new trial by virtue of the *Mercado* dictum in no way implicates the Double Jeopardy Clause. See *United States* v. *Smith,* 331 U.S. 469, 474; *United States* v. *Ball, supra,* 163 U.S. at 672.

It follows, we submit, that the government's appeal, if successful, will require no retrial, nor even any reopening of the case to allow additional evidence. If the district court's legal conclusion was erroneous, there is no escaping the entry of a judgment of conviction on the findings of fact already made.

4. The premises established, we return to our submission that the Double Jeopardy Clause does not bar the government's appeal of a legal ruling that leaves all factual determinations undisturbed and provokes no second trial. The balance of our brief is devoted to showing that the rule we suggest is consistent with the original understanding of the constitutional provision and with the decisions of this Court in analogous situ-

ations, and that the cases relied upon by the court below would mandate no different result.

We begin (*infra*, pp. 18–24) by briefly sketching the background against which the Double Jeopardy Clause was adopted, concluding tha the English common law, at its most restrictive, did not bar correction of legal error when no second trial ensued. The sparse legislative history of the Fifth Amendment, we note, is not inconsistent. Nor is there anything to the contrary in the jurisprudence of this Court, which repeatedly stresses that the double jeopardy provision is concerned with a second trial or second punishment for the same offense.

Next (*infra*, pp. 25–36), we examine in detail those decisions of this Court that the majority below deemed dispositive: *Ball, Kepner, Fong Foo* and *Sisson*. We notice many distinctions, but focus on the critical difference that in each of them the ruling challenged, unlike here, was at least partly a factual determination on the merits, and that, in the first three cases, the government was effectively seeking a retrial.

Finally (*infra*, pp. 37–41), we analogize our case to two other situations which, the Court has consistently held, do not implicate the Double Jeopardy Clause. One is the recognized appeal by the government from a decision arresting judgment after conviction. We suggest it can make no difference, in terms of the values underlying the double jeopardy principle, whether that post-conviction ruling is based on the allegations of the indictment or on facts disclosed at trial. The other comparable situation is appellate review by this Court of a decision of a court of appeals reversing a

conviction on grounds such as the district judge invoked here. In that situation as well as in ours, the action setting aside the conviction is based on facts adduced at trial that bear on the merits and is, therefore, presumably an "acquittal." We perceive no reason why the Double Jeopardy Clause should be deemed to bar review in one case and not the other.

II. SINCE THE DOUBLE JEOPARDY CLAUSE WAS INTENDED TO LIMIT THE NUMBER OF TIMES A DEFENDANT COULD BE TRIED FOR THE SAME OFFENSE, IT DOES NOT BAR AN APPEAL HERE

1. The starting point for any inquiry into the purpose of the Double Jeopardy Clause must be the common law rule that served as the backdrop for the Framers of the Constitution (see *Kepner* v. *United States*, 195 U.S. 100, 125). The most succinct statement of that rule, and one "which greatly influenced the generation that adopted the Constitution,"[9] is found in 4 *Blackstone's Commentaries*, Ch. XXVI, p. 335 (Tucker ed.). There, in describing the common law plea of *autrefois acquit*, Blackstone observed:

> [T]he plea of the *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly found* not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar to *any sub-*

[9] *Green* v. *United States*, 355 U.S. 184, 187.

> *sequent accusation* for the same crime. [Emphasis added.]

The same theme is reflected in IV Hawkins, *Pleas of the Crown* 312 (1795 ed.):

> The plea of *auterfoits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found "not guilty" on an indictment or appeal *free from error*, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of *any subsequent indictment* or appeal for the same crime. [Emphasis added.] [10]

The thrust of these commentaries is that the common law double jeopardy principle barred a second trial on the same facts only if (a) the first acquittal was "fairly found" or "free from error," and (b) the subsequent proceedings involved a fresh indictment or accusation. This is, of course, analogous to the principle of *res judicata* that governs civil litigation. The rule was summed up by Mr. Justice Holmes, dissenting, in *Kepner* v. *United States, supra,* 195 U.S. at 134: "[E]verybody agrees that the [double jeopardy] principle in its origin was a rule forbidding a trial

[10] The "appeal" to which Hawkins made reference was not the process of appellate review of trial errors, but rather the quasi-criminal proceeding which could be commenced at common law by a private party. See Friedland, *Double Jeopardy* 8 (1969); Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 605–606 (1934).

in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."

That was, apparently, the English practice, at least until 1660: the Crown could have a new trial after an acquittal if the original trial entailed gross errors of law. 2 Hale, *Pleas of the Crown* 247 (Dougherty ed. 1800). To be sure, several cases decided in the late 17th century suggested that the Crown could not seek a new trial after a verdict of acquittal (Pet. App. A, pp. 9a–10a). However, it is not entirely clear that this rule had anything to do with policies reflected by the double jeopardy principle. Instead, it may have developed—in Judge Friendly's words—as "an independent principle" (Pet. App. A, p. 14a), reflecting the concern that, if a new trial were permitted after an acquittal, the prosecutor "would see where he failed before, and might use ill means to prove what he failed before." 21 Viner, *A General Abridgment Of Law and Equity* 478–479 (1793 ed.); see also Friedland, *Double Jeopardy* 285–286 (1969). At the same time, the law continued to permit retrial after a mistrial had been declared for whatever reason; it was only the verdict of the jury that was a bar to subsequent prosecution, and jeopardy was deemed to attach only to the verdict. Kirk, *"Jeopardy" During The Period Of The Year Books,* 82 U. Pa. L. Rev. 602, 603 (1934).

Thus, while the full contours of the English double jeopardy principle may not have been clearly marked at the time of the adoption of the Constitution, it is reasonably clear that, at most, it barred a second *trial*

for the same offense, and then probably only if the subsequent trial resulted from a fresh indictment. At all events, however, the common law principle affords respondent no shield in our case, since the present appeal would not place him in jeopardy of a second trial, either on the indictment upon which he was tried or upon a subsequent indictment.[11]

2. The legislative history of the Double Jeopardy Clause, which is fully explored in the majority opinion below (Pet. App. A, pp. 12a–14a), actually casts little light on the view of English common law principles that the Framers intended to adopt. The original version of the Double Jeopardy Clause, as introduced by James Madison in the House of Representatives, provided: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Congress 434. An unsuccessful effort was made in the House of Representatives to strike the word "trial" from the proposed amendment. *Id.* at 753. Representative Benson of New York objected to Madison's language because he thought it changed the existing law, which allowed a defendant to be tried a second time upon reversal of his original conviction. *Ibid.*[12] Although the original version of the Double Jeopardy Clause, as proposed

[11] Indeed, it appears that where a trial judge entered a judgment of acquittal upon special findings returned by a jury, an appeal was permitted at common law. Friedland, *supra*, at 287, n. 4. That is, in effect, the situation here.

[12] That an appeal could be taken by a defendant from a judgment of conviction, and that he could be retried if successful, was well established at common law. See Friedland, *supra*, at 240.

by Madison, was approved without change by the House of Representatives, the Senate rejected that language without recorded explanation in favor of the more traditional common law expression, employing the term "jeopardy" rather than specifying "more than one trial, or one punishment." See generally, Sigler, *Double Jeopardy* 30–31 (1969).

This somewhat sparse "legislative history," as the court of appeals acknowledged, "leave[s] it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century [in England] but not incorporated in the clause * * *." (Pet. App. A, p. 14a).[13]

Although we shall address ourselves to the conclusion of the court of appeals that "any uncertainty as to the disposition of this case [based on the history of the Double Jeopardy Clause] is resolved, as far as we are concerned, by Supreme Court decisions * * *" (Pet. App. A, p. 14a), it suffices to reemphasize that the uncertainty that does exist regarding the intent of the Framers of the Double Jeopardy Clause involved only the question whether a *new trial* could be obtained on appeal after an *acquittal;* and that there is not the

[13] Although the court of appeals added that "the general flavor of the debate, especially the emphasis on the defendant's right to a retrial, is somewhat to the contrary" (Pet. App. A, p. 14a), we note that this somewhat inconclusive debate was in the House of Representatives, while the final version of the Double Jeopardy Clause was drafted in the Senate.

slightest support for the view that such an appeal was barred where, as here, no retrial is sought. Indeed, from *Ex parte Lange*, 18 Wall. 163, 169, to *Illinois* v. *Somerville*, 410 U.S. 458, every opinion of this Court which has spoken to the issue of the scope of the Double Jeopardy Clause has discussed it in terms of the protection against being twice *tried* or punished for the same offense.[14] And, in *Green* v. *United States*, 355 U.S. 184, the Court explained that because the Double Jeopardy Clause protects against a second trial, "the Government cannot secure *a new trial* by

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[14] In *North Carolina* v. *Pearce*, 395 U.S. 711, the protection afforded by the Double Jeopardy Clause was summarized as follows (395 U.S. at 717):

> * * * [T]he Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

See also *Kepner* v. *United States*, *supra*, 195 U.S. at 130–131, 133, holding that the protection of the Double Jeopardy Clause is against "being again tried for the same offense," and construing *United States* v. *Ball*, 163 U.S. 662, as holding "that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment"; *Stroud* v. *United States*, 251 U.S. 15, 18, holding that "[t]he protection afforded by the [Double Jeopardy Clause] * * * is against a second trial for the same offense"; *Green* v. *United States*, 355 U.S. 184, 187–188, stating that the Double Jeopardy Clause was intended "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense"; *United States* v. *Jorn*, 400 U.S. 470, 479, holding that the Double Jeopardy Clause prohibits the state from subjecting individuals "to repeated prosecutions for the same offense."

means of an appeal even though an acquittal may appear to be erroneous" (355 U.S. 188; emphasis added).[15]

Accordingly, we submit that, looking to the purpose of the Double Jeopardy Clause, as revealed by its common law origins, the conclusion must be that the present appeal, which does not involve a retrial, is not barred.[16] Perhaps so, the majority argued below, but a different result is dictated by decisions of this Court. We now turn to examine that contention.

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[15] *Green* did not involve an appeal by the United States.

[16] Even if a successful appeal would necessitate a retrial, we do not agree that the Double Jeopardy Clause would necessarily bar the appeal. The protection against being tried twice for the same offense is not absolute, and it has yielded under varying circumstances to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689; *Illinois* v. *Somerville*, 410 U.S. 458; see also cases collected in Anno: *Double Jeopardy—Mistrial*, 6 L. Ed. 2d 1510–1519 (1962). Thus, in addition to the settled construction of the Double Jeopardy Clause permitting a defendant to be tried again and again when earlier trials have terminated prior to verdict (see *e.g.*, *United States* v. *Castellanos*, 478 F. 2d 749 (C.A. 2) and cases there cited), it is well settled that a defendant may be retried for the same offense where his conviction has been reversed on appeal. Here again, other considerations of policy have been held to outweigh the policies reflected by the Double Jeopardy Clause. *United States* v. *Jorn*, *supra*, 400 U.S. at 484; *United States* v. *Tateo*, 377 U.S. 463, 466. Finally, it appears settled that, when the court of appeals reverses a judgment of conviction because of the insufficiency of the evidence, it may in its discretion direct a new trial, even though its determination plainly is an "acquittal" within the generally accepted definition of that term. *Bryan* v. *United States*, 338 U.S. 552, 560; *United States* v. *Tateo*, *supra*, 377 U.S. at 467; see also *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9), which sets out the criteria for the exercise of such discretion.

Accordingly, most scholars and commentators have argued that an appeal from a verdict of acquittal, undertaken not to

III. THE DECISIONS OF THIS COURT DO NOT CONSTRUE THE DOUBLE JEOPARDY CLAUSE AS BARRING AN APPEAL FROM AN ACQUITTAL WHERE A NEW TRIAL IS NOT SOUGHT

A. THE CASES RELIED UPON BY THE COURT OF APPEALS ARE NOT CONTROLLING HERE

Although acknowledging its own doubts whether the Double Jeopardy Clause was intended to bar an appeal from an acquittal, even where a new trial was sought, the majority below deemed itself bound by decisions of this Court to dismiss our appeal in this case. In reaching that conclusion, the court below relied upon the dictum in *United States* v. *Ball, supra,* 163 U.S. at 671, to the effect that a "verdict of acquittal * * * could not be reviewed * * * without putting [a defendant] * * * twice in jeopardy," and on what it characterized as the holding of three other cases (*Kepner* v. *United States,* 195 U.S. 100; *Fong Foo* v. *United States,* 369 U.S. 141; and *United States* v. *Sisson,* 399 U.S. 267). "We cannot see * * * in the circumstances here presented," the court of appeals observed, "[how] the

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give the prosecutor a second try at proving what he failed to prove before, but to secure an opportunity to obtain a verdict free from substantial legal error, should not be barred by the Double Jeopardy Clause. See Friedland, *supra*, at 310; Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927); Sigler, *supra*, at 114. Such appeals, as Mr. Justice Cardozo wrote for the Court in *Palko* v. *Connecticut*, 302 U.S. 319, 328, do not involve an attempt "to wear the accused out by a multitude of cases with accumulated trials."

Of course, as we have already stated, the important and unresolved questions surrounding this issue need not be reached here, since a second trial is not sought.

Government can thread a way through this thicket so long as these decisions stand." (Pet. App. A, p. 29a).

The "thicket," we submit, is not nearly so dense as the majority below suggests. In fact, there is not a single holding of this Court that sustains the conclusion of the court of appeals that an appeal from a post-jeopardy order terminating a criminal prosecution is barred by the Double Jeopardy Clause, merely because the order was "based on facts developed at trial * * * which went to the general issue of the case," where the error may be corrected without a second trial (Pet. App. A, p. 26a). Whether or not each of these cases was correctly decided on its own facts, none of the four cases relied upon by the court of appeals involved our problem. Ignoring other differences, the critical distinction is that—unlike our situation—the further proceedings disallowed in each of those cases, except for *Sisson*, would have required setting aside factual determinations on the merits and would have necessitated a new trial. To be sure, the cases also contain some broad language that can be stretched to reach our case; but to do so we submit, would not be faithful to the context in which the words were written.

What, then, are these cases, said to be controlling here? We consider them chronologically.

1. United States v. *Ball, 163 U.S. 662*

Three men were indicted and tried for murder; two were convicted by a jury and one (Ball) was acquitted. The convictions of Ball's co-defendants were reversed on appeal on the ground that the indict-

ment was fatally deficient in failing to allege that the victim died within a year and a day of the assault. A proper indictment was then returned against Ball, who had been acquitted, as well as his two co-defendants, and all three were retried and convicted. The Court reversed the conviction of Ball on the ground that a subsequent indictment was barred by the Double Jeopardy Clause.

Speaking to the issue "for the first time," the Court announced the rule "that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing" (163 U.S. at 669). While it was also held that Ball's two co-defendants, who had initially been convicted, could be tried again after their convictions had been reversed, the Court held that "Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only" (*id.* at 670). And the Court added that such a verdict barred a second trial even if the judgment entered thereon was void (because entered on a Sunday).

So far, obviously, *Ball* entailed nothing remotely relevant to our case. All the Court decided was that an unappealed acquittal that had become final must stand. But in disposing of the issue before it, the Court inserted a gratuitous remark, which we italicize in the following passage (163 U.S. at 671):

> As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, *and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.* However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence. *United States* v. *Sanges,* 144 U.S. 310; *Commonwealth* v. *Tuck,* 20 Pick. 356, 365; *West* v. *State,* 2 Zabriskie, (22 N.J. Law,) 212, 231; 1 Lead. Crim. Cas. 532.

However, even this *dictum* (and it is plainly that) does not carry all the weight it has been asked to bear.[17]

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[17] Of the three cases cited by the Court in this passage, not one involved the issue whether the Double Jeopardy Clause barred an appeal from a judgment of acquittal. Indeed, *United States* v. *Sanges*, 144 U.S. 310, the only opinion of this Court mentioned, merely held that in the absence of a statute, the United States could not appeal from an adverse (pretrial) judgment in a criminal case. Indeed, *Sanges* strongly suggested that such an appeal—even from a judgment entered on "a verdict of acquittal"—could be taken if a statute authorized it. In an opinion by Mr. Justice Gray, who also wrote the opinion in *Ball*, the Court in *Sanges* concluded (144 U.S. at 318):

> * * * [T]he decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In

The Court was addressing itself to the issue whether a general jury verdict of acquittal—when not followed by a valid judgment entered upon it—could be invoked as a bar to a "subsequent prosecution for the same offense." In that context, the statement that an acquittal cannot be "reviewed on error or otherwise" suggests no more than that a second trial—in Ball's situation the inevitable outcome of a successful government appeal—cannot be forced on an acquitted defendant by any means.[18] That is, of course, not our case; here no factual determination need be disturbed nor any new trial had.

2. Kepner v. *United States, 195 U.S. 100*

In *Kepner*, also invoked by the court of appeals, the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such an acquittal, and the appellate court had the authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball, supra,* the Court held that such

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either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

[18] For the reasons touched upon briefly in footnote 16, *supra*, we do not accept this correct statement of the *Ball* dictum as a correct statement of the law. However, since respondent will not face a new trial if the district court's action here is ultimately reversed, the issue of the correctness of the dictum need not be argued further in the present case.

a procedure is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *.

We note, first, that *Kepner* did not involve the Double Jeopardy Clause, but the construction of an Act of Congress, applicable to the Philippines, which incorporated the double jeopardy principle. While it is true that the opinion treats the statutory provision as having the same effect as the Fifth Amendment (195 U.S. at 124), this Court has subsequently admonished that such language is to be regarded as dictum and is not "conclusive" in cases "where the interpretation of the Fifth Amendment is necessarily decisive" (*Green* v. *United States*, 355 U.S. 184, 197, n. 16).[19] Accord: *Hoag* v. *New Jersey*, 356 U.S. 464, 478, n. 3 (dissenting opinion of Mr. Justice Douglas); *Abbate* v. *United States*, 359 U.S. 187, 198, n. 2 (separate opinion of Mr. Justice Brennan).

[19] In *Green* the Court was referring to *Trono* v. *United States*, 199 U.S. 521, a case decided a year after *Kepner*, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.

At all events, *Kepner* cannot be read to bar every appeal from an acquittal. As the Court itself noted, the case was "practically" the same as *Ball* in that a second trial "upon the merits" was sought to be justified. Indeed, under Philippine law, the "review" was effectively a trial *de novo*: the appellate tribunal weighed the credibility of witnesses, made new findings of fact, and entered a judgment of conviction. It requires no elaboration to distinguish that situation from ours, in which, we repeat, no factual determination is challenged and no retrial is necessary. *Kepner* tells us only two things: (1) that an unexplicated acquittal by a judge sitting as trier of fact enjoys the same status as the "not guilty" verdict of a jury; (2) that a second trial after such an acquittal is equally barred whether it takes place in a higher court on the original indictment or in the court of first instance on a fresh accusation. That teaching does not help respondent here.

3. Fong Foo v. *United States*, *369 U.S. 141*

Fong Foo involved the entry of a judgment of acquittal in the middle of the government's case, based upon the "supposed lack of credibility in the testimony of the witnesses for the prosecution" and the "supposed improper conduct on the part of the Assistant United States Attorney who was prosecuting the case" (369 U.S. at 142). Although there was no statute authorizing an appeal from such a ruling, the United States obtained a writ of mandamus from the court of appeals directing the district court to vacate the judgment of acquittal and to retry the defendant. In

reversing the order of the court of appeals, this Court held that the "constitutional provision [that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb'] is at the very root of the present case, and * * * that th[is] guaranty was violated when the Court of Appeals set aside the judgment of acquittal *and* directed that the petitioners be tried again for the same offense" (369 U.S. at 143; emphasis added).

Plainly enough, that case is distinguishable from ours. There, unlike here, the judgment attacked, albeit entered by the judge, involved a factual determination on the merits that could not be set aside without requiring a second trial. In those circumstances, the Court held, the "final judgment of acquittal" could not be disturbed even if the judge's intervention was erroneous, premature, even unauthorized.[20] The result—which appears to give greater weight to labels than the Court has more recently condoned (see *United States* v. *Jorn, supra,* 400 U.S. at 478, n. 7; *United States* v. *Sisson, supra,* 399 U.S. at 279, n. 7)—may be ques-

[20] In *Fong Foo*, the United States did not challenge before this Court the dictum in *Ball* that an appeal could not be taken from an acquittal, but argued only that this rule was inapplicable where the district court had no power to enter such judgment and, therefore, the "supposed acquittal, being a nullity, will not support a plea of *autrefois* acquit" (Br. 25, No. 64, October Term 1961). After this argument was rejected (and we believe properly), the Court simply relied upon the uncontested dictum in *Ball* that an appeal, which would place the defendant in jeopardy of a second trial, could not be taken from an acquittal.

tioned.[21] But, for present purposes, it is enough to say that *Fong Foo* is not our case, if only because there a new trial must have followed a successful appeal.

4. United States v. *Sisson*, *399 U.S. 267*

The last case upon which the majority below relied is *United States* v. *Sisson*. There, after a jury had convicted the defendant of failing to report for induction, the district court terminated the prosecution on the basis of its conclusion that the evidence was insufficient to sustain the defendant's guilt. This Court held that this was in effect an acquittal and that an appeal to this Court was not authorized under the old

[21] It cannot be without some significance in this regard that *Fong Foo* has been cited in but one opinion of this Court in the more than twelve years since it was decided (*Will* v. *United States*, 389 U.S. 90); and, in that opinion, it was cited in a manner which suggests that the Court viewed the decision in *Fong Foo* as reflecting little more than the proposition that, *as a matter of policy*, appeals by the United States in criminal cases are not favored "at least in part because they always threaten to offend the policies behind the double jeopardy prohibition, cf. *Fong Foo* v. *United States*, 369 U.S. 141 (1962)," (389 U.S. at 96), and that, in the absence of a statute authorizing an appeal (389 U.S. at 97, n. 5), "[m]andamus * * * may never be employed as a substitute for appeal in derogation of these clear policies. *E.g.*, *Fong Foo* v. *United States*, 369 U.S. 141 (1962) * * *" (389 U.S. at 97). Of course, even the suggestion in *Will* that appeals by the United States in criminal cases are "something unusual, exceptional, [redacted] not favored" (389 U.S. at 96) is undermined by the present Criminal Appeals Act and its declaration that its provisions are to be construed liberally to effectuate its purpose of permitting an appeal in all cases in which the Constitution permits (18 U.S.C. 3731).

Criminal Appeals Act, which then permitted the government to appeal, after verdict, only from a "decision arresting a judgment of conviction for insufficiency of the indictment."

Of course, insofar as *Sisson* merely construes restrictions, now removed, in the appeal statute, it cannot govern here. But, as the majority below noted, the opinion goes further—without apparent reason. First, the Court characterized the district judge's ruling as "an acquittal" because it was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial" (399 U.S. at 288). Later, the Court repeated the *Ball* dictum about review "on error or otherwise," substituting "acquittal" for the words "verdict of acquittal" in the original (*id.* at 289–290).[22] Putting these two passages together, the court below concluded that *Sisson* ruled our case (Pet. App. A, pp. 23a–25a). We submit that exercise is too facile.

We must remember that there was, after all, no

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[22] The whole of the constitutional aside is comprised in the following text and note (*ibid.*):

"Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reviewed, on error other otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence,' *United States* v. *Ball*, *supra*, 163 U.S. 662, 671 (1896).[18]

"[18] This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried."

occasion to make a constitutional ruling in *Sisson*, and the passage invoked must be treated as gratuitous.[22a] Besides, the opinion does no more than reproduce the *Ball* dictum, which, as we have shown, speaks only to the situation where setting aside an acquittal requires a new trial—which was not what the *Sisson* appeal sought. Nor is the footnote cited by the majority below (399 U.S. at 290, n. 18) relevant here. Of course the Double Jeopardy Clause as construed in *Ball* would bar retrial on a new indictment if the judicial acquittal is allowed to become final. But that does not bear in any way upon the constitutional propriety of permitting an appeal that, if successful, would trigger no new trial. Finally, we are cautioned by three members of the *Sisson* court, dissenting, to doubt whether the majority "really mean[t] to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731]"[23] (399 U.S. at 328, n. 4 (dissenting opinion of Mr. Justice White, joined by the Chief Justice and

[22a] "The Government bases its claim that this Court has jurisdiction to review the District Court's decision *exclusively* on the 'arresting judgment' provision of the Criminal Appeals Act * * *" (399 U.S. at 278–279; emphasis supplied).

[23] It is plain from the legislative history of the 1971 amendments to the Criminal Appeals Act that Congress intended to overrule the construction that *Sisson* placed on the old Criminal Appeals Act. ("One example of the kind of case which would thereby be made appealable is the *Sisson* case." S. Rep. No. 1296, 91st Cong., 2d Sess., p. 11; footnote omitted).

Mr. Justice Douglas)).[24] See also *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1), cited with approval in *United States* v. *Brewster*, 408 U.S. 501, 506, where the Court of Appeals for the First Circuit characterized the rationale of *Sisson* as "an approach not in terms of double jeopardy, but in terms of the kind of error [former] section 3731 was intended to cover" (439 F. 2d at 973).

B. DECISIONS OF THIS COURT IN ANALOGOUS SITUATIONS UPHOLD THE APPEALABILITY OF POST-JEOPARDY ORDERS TERMINATING CRIMINAL PROSECUTIONS

Having closely examined each of the four cases invoked by the majority below, we conclude that nothing stands in the way of our submission. But that is not all. Well settled doctrines, consistently approved by this Court, suggest affirmatively that our appeal does not violate the Double Jeopardy Clause. We refer to the practice of this Court in reviewing court of appeals decisions that reverse convictions and to the

[24] In *United States* v. *Jorn*, 400 U.S. 470, Mr. Justice Harlan, who wrote the opinion in *Sisson*, gave substance to the skepticism expressed by Mr. Justice White. In the only portion of the *Jorn* opinion which commanded a majority of the Court (400 U.S. at 489, n. 2), Mr. Justice Harlan not only spoke of *Sisson* as articulating the criterion of an "acquittal" for the purposes of assessing this Court's jurisdiction over an appeal under old 18 U.S.C. 3731 (400 U.S. at 478, n. 7), but he also suggested—without envisioning any apparent constitutional difficulties—that an appeal could be taken from a post-jeopardy dismissal of an indictment under the newly amended Criminal Appeals Act (400 U.S. at 477, n. 6).

long-standing rule allowing appeals from decisions arresting judgment.

In dismissing our appeal here, the court of appeals expressly grounded its decision on the circumstance that the order of the district court was "based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case" (Pet. App. A, p. 26a). Yet that is precisely what occurs every time a petition for certiorari is granted to review a judgment of a court of appeals that directs dismissal of an indictment based on the application of legal principles to facts developed at trial. For example, in *United States* v. *Russell*, 411 U.S. 423, a case illustrative of many others,[25] the court of appeals, relying on evidence developed at the trial, set aside a judgment of conviction on the group that (*id.* at 424) "an undercover agent supplied an essential chemical for manufacturing the methamphetamine which formed the basis of respondent's conviction," concluding that this constituted entrapment as a matter of law. 459 F. 2d 671, 673 (C. A. 9). Following the definition of the court below in this case, that ruling is as much an "acquittal" as the district court's action here. Yet, when this Court decided *Russell* on the government's petition for certiorari, there was no suggestion that the Double Jeopardy Clause stood in the way. Indeed, the Court long ago declined "to subscribe to * * * a theory" which would bar such relief from an order

[25] See, *e.g.*, *United States* v. *Maze*, 414 U.S. 395; *United States* v. *McGrath*, 412 U.S. 936; *United States* v. *Seeger*, 380 U.S. 163.

of the court of appeals. *Forman* v. *United States*, 361 U.S. 416, 426.

The reason such appellate review does not implicate the policies reflected by the Double Jeopardy Clause is that the trier of fact has found that the defendant has committed the acts charged in the indictment, and a "retrial" is not necessary to correct the legal error of the court of appeals; therefore, the appeal does not put the defendant in jeopardy of a second trial.[26]

The same rationale likewise explains the long recognized practice of appeals from district court orders in arrest of judgment. See, *e.g.*, *United States* v. *Green*, 350 U.S. 415; *United States* v. *Bramblett*, 348 U.S. 503; *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, 414 U.S. 1135. While such post-guilty-verdict orders are for historical reasons entered solely for defects that appear on the face of the record—typically the insufficiency of the indictment to state an offense (see *United States* v. *Sisson*, 399 U.S.

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[26] Since the order of the court of appeals merely directs that the judgment of conviction be set aside and that the indictment be dismissed, and since the petition for certiorari may be granted before the district court acts, it could be argued that the Double Jeopardy Clause is not violated because no final judgment has been entered on the court of appeals' determination that the evidence is insufficient to warrant conviction. Such a technical argument, however, not only has nothing whatever to do with the policies reflected by the Double Jeopardy Clause, but it cannot be reconciled with the holding that it is the determination by a jury that the evidence is insufficient to establish guilt—"although not followed by any judgment"—which gives rise to the bar of the Double Jeopardy Clause. *United States* v. *Ball*, *supra*, 163 U.S. at 671. (Of course, even where a district court sets aside a guilty verdict and directs an "acquittal", that order cannot be considered final until the time to appeal has run).

267, 280–287) [27]—it is difficult to understand on what basis the Double Jeopardy Clause can be construed to permit an appeal from a district court order in arrest of judgment, but to bar such an appeal from other, similar post-guilty-verdict orders that accept as true the facts found by the trier of fact and rest on a legal determination that entry of a judgment of conviction is not justified.

The point is forcefully made by Judge Learned Hand in *United States* v. *Zisblatt*, 172 F. 2d 740, 743 (C.A. 2), appeal dismissed, 336 U.S. 934, a case in which the district court entered an order dismissing the indictment on the merits after a guilty verdict had been returned:

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy", but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were

[27] "In England [under the common law] the judge could not * * * direct a verdict of acquittal for legal insufficiency of the evidence; his only power, at least in cases involving felonies, was to recommend royal clemency, which was granted as a matter of course." *United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), authorities cited, certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917.

> the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.[28]

See also *United States* v. *Weinstein*, 452 F. 2d 704 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917, where the court of appeals, per Friendly, C. J., held that the issuance of a writ of mandamus directing the district court to vacate a post-judgment-of-conviction order dismissing an indictment on the basis of facts adduced at the trial "will not subject [the defendant] to *retrial* in violation of his right to be protected against double jeopardy" (452 F. 2d at 712–713; emphasis supplied).

Accordingly, there can be no question that, had the district court here entered a judgment of conviction, and had the court of appeals reversed on the same legal ground that the district court employed, the Double Jeopardy Clause would not have barred further appellate review by this Court. Similarly, as Judge Lumbard stressed here in dissent (Pet. App. A,

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[28] Having concluded, however, that it was without jurisdiction to hear the appeal because a direct appeal to this Court was mandated by the "motion in bar" provision of former Section 3731, the court of appeals certified the case to this Court. The appeal was dismissed on the motion of the Solicitor General solely on the ground that the *statute* did not authorize an appeal from a post-jeopardy order. See *United States* v. *Sisson*, *supra*, 399 U.S. at 306.

pp. 31a–41a), no double jeopardy claim would have been arguable if the facts found had been alleged in the indictment and the district judge, after trial, had concluded that the charge did not state an offense. We fail to appreciate what considerations of policy, or arguments of logic, distinguish those cases from ours.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded for determination of the merits of the appeal from the order of the district court.

Respectfully submitted.

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